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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,)	No. P1300CR20081339
)	
Plaintiff,)	Div. 6
)	
vs.)	MOTION REGARDING JURY
)	SELECTION PROCESS AND TO
STEVEN CARROLL DEMOCKER,)	SEQUESTER JURY DURING
)	SELECTION
Defendant.)	
)	
)	
)	(Oral Argument Requested)

Defendant Steven DeMocker, by and through undersigned counsel, files this request for the Court to Sequester the Jury During Selection. This motion is based upon Mr. DeMocker's rights to due process, equal protection, counsel, a fair trial and appeal, freedom from double jeopardy, and freedom from cruel and unusual punishment under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States

1 Constitution and under the Arizona Constitution, Article 2, Sections 1, 2, 3, 4, 8, 10, 11,
2 13, 15, 24, 32 and 33, as well as the authorities cited in the following Memorandum of
3 Points and Authorities.
4

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. CONDUCTING THE *VOIR DIRE* INDIVIDUALLY AND IN**
7 **SEQUESTRATION PERMITS VENIREMEN TO AIR THEIR HONEST**
8 **VIEWS WITHOUT SOCIAL PRESSURE FROM THE PRESENCE OF**
9 **OTHER VENIREMEN AND POSSIBLE FAR OF SOCIAL STIGMA.**

10 The process of death qualifications of jurors has been attacked repeatedly as a
11 tool by which a skilled prosecutor can create a jury predisposed to convict and to
12 impose the ultimate penalty. Sequin & Horowitz, *The Effects of "Death Qualification"*
13 *on Juror and Jury Decisioning: An Analysis from Three Perspectives*, 8 L. Psychology
14 Rev. 49 (1984); Fitzgerald & Ellsworth, *Due Process vs. Crime Control: Death*
15 *Qualification and Jury Attitudes*, 8 Law and Human Behavior 53 (1984); Thompson,
16 Cowan, Ellsworth & Harrington, *Death Penalty Attitudes and Conviction Proneness:*
17 *The Translation of Attitudes into Verdicts*, 8 Law and Human Behavior 95 (1984).
18 Some studies have suggested that the *process* of death qualification tends to bias
19 remaining jurors toward the prosecution. E.g. Haney, *On the Selection of Capital*
20 *Juries: The Biasing Effects of the Death-Qualification Process*, 8 Law and Human
21 Behavior 121 (1984).

22 Nonetheless, death qualification has been approved and validated as the method
23 of seating a capital jury by this Court and others over the objection of the defense in this
24 case. *Witherspoon v. Illinois*, 391 U.S. 510, 517-518, 88 S.Ct. 1770, 1774-1775, 20
25 L.Ed.2d 776 (1968). Our goal must be to engage in this process in the fairest way
26 possible under the circumstances.
27
28

1 The most practical and effective procedure available for minimizing the effects
2 of death qualification is sequestered *voir dire*. The California Supreme Court, when
3 presented with these issues, held in *Hovey v. Superior Court*, 28 Cal.3d 1, 80-81, 168
4 Cal.Rptr. 128, 616 P.2d 1301 (1980):

5
6 ...[This] court declares ... that in future capital cases the portion of
7 voir dire of each prospective juror which deals with issues which
8 involve death-qualifying the jury should be done individually and in
9 sequestration ... Although trial counsel or the court may pose
10 general questions to the panel, venire persons should not respond to
11 any questions beyond those routinely asked in any criminal trial until
12 they are outside the presence of their fellow venire persons. ...
13 Given the frailty of human institutions and the enormity of the jury's
14 decision to take or spare a life, trial courts must be especially
15 vigilant to safeguard the neutrality, diversity, and integrity of the
16 jury to which society has entrusted the ultimate responsibility for life
17 or death.

18 The United States Supreme Court has also addressed this issue in *Gray v.*
19 *Mississippi*, 481 U.S. 648, 107 S. Ct. 2045, 95 L.Ed.2d 622 (1987). It is cited here for
20 two reasons: (1) It speaks to the proper utilization of cause and peremptory challenges
21 and the constitutional infirmity of excluding a juror for cause who asserts some
22 hesitation in imposing the death penalty; and (2) *It demonstrates that questioning by the*
23 *Court can impart to prospective jurors the answers that they are expected to give to*
24 *questions, and such questioning in a group setting involving other prospective jurors*
25 *taints the entire panel:*

26 The panel members were questioned individually for the most part,
27 but this took place in the presence of others in the box as well as in
28 the presence of all prospective jurors in the courtroom waiting to be
called. As a result, venire members were able to learn the
consequences of different responses. In particular, they learned what
responses would likely result in their being excluded from the jury.
This knowledge caused difficulty during the prosecutor's
questioning. He asked each panel member whether he or she could
vote to impose a death sentence. Whenever a prospective juror

1 revealed any such scruples or expressed any degree of uncertainty in
2 their ability to cast such a vote, the prosecutor moved to have the
3 panel member excused for cause. In one instance the court granted
4 the motion. In eight instances, however, the court denied the
5 motion. The prosecutor then used peremptory challenges to remove
6 those eight panel members. After his denials of these for-cause
7 motions, the judge observed that venire members perhaps were not
8 being forthright in their responses to the prosecutor. He criticized
9 them for expressing insincere hesitation about the death penalty in
10 order to be excluded from the jury. He admonished them: "Now I
11 don't want nobody telling me that just to get off the jury. Now that's
12 not being fair with me."

13 *Gray* at 651-653.

14
15 **II. PROSPECTIVE *VENIREMEN* WHO WOULD AUTOMATICALLY**
16 **VOTE FOR DEATH OR WHO DEMONSTRATE THAT THEY CANNOT**
17 **FAIRLY CONSIDER MITIGATING EVIDENCE MUST BE EXCUSED**

18 A Court must excuse a prospective juror if actual bias is discovered during *voir*
19 *dire*. Bias can be revealed by a juror's express admission of specific facts. Frequently,
20 however, jurors are reluctant to admit bias, and the reality of their attitudes must be
21 revealed by circumstantial evidence. *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir.
22 1977).

23 The capital defendant may challenge for cause any prospective juror who would
24 automatically vote to impose the death penalty, and it is not sufficient for the Court to
25 rehabilitate such a juror with general "will you follow the law?" questions. *Morgan v.*
26 *Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1991). Such "follow the law"
27 entreaties are nothing more than a tip to the juror that if he/she wishes to remain in the
28 courtroom, the strong answer had better be "yes". This "wink and nod" juror selection
is fictional fairness and is impermissible in the selection of a capital jury.

In *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978), the
Supreme Court held that for a capital sentencing procedure to pass constitutional

1 standards, the death penalty state must not preclude consideration of relevant mitigation
2 circumstances. In *Eddings v. Oklahoma*, 455 U.S. 104, 113-114, 102 S.Ct. 869, 71
3 L.Ed. 2d 1 (1982), the Court held that “just as the state may not by statute preclude the
4 sentence from considering any mitigating factor, neither may the sentence refuse to
5 consider, as a matter of law, any mitigating evidence.”

6 This principle was immediately adopted by the Arizona Supreme Court in *State*
7 *v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), and the legislature thereafter revised
8 the mitigation statutes to conform to the rules laid down by the Supreme Court of the
9 United States.

10 The concept that mitigating factors are essential to enable the jury to make a
11 “reasoned *moral* response to the defendant’s background, character and crime,” was
12 codified as an Eighth and Fourteenth Amendment principle in *Penry v. Lynaugh*, 492
13 U.S. 302, 109 S. Ct. 2934, 106 L.Ed.2d 256 (1989):

14 “In contrast to the carefully defined standards that must narrow a
15 sentencer’s discretion to *impose* the death sentence, the Constitution
16 limits a State’s ability to narrow a sentencer’s discretion to consider
17 relevant evidence that might cause it to *decline to impose* the death
18 sentence.” *McCleskey v. Kemp*, 481 U.S. 279, 304, 107 S.Ct. 1756,
19 1773, 95 L.Ed.2d 262 (1987) (emphasis in original). Indeed it is
20 precisely because the punishment should be directly related to the
21 personal culpability of the defendant that the jury must be allowed to
22 consider and give effect to mitigating evidence relevant to a
23 defendant’s character or record of the circumstances of the offense.
24 Rather than creating the risk of an unguided emotional response, full
25 consideration of evidence that mitigates against the death penalty is
26 essential if the jury is to give a “reasoned *moral* response to the
27 defendant’s background, character and crime.” (Citations omitted).
28 In order to ensure “reliability in the determination that death is the
appropriate punishment in a specific case, *Woodson*, 428 U.S. at 305,
96 S.Ct. at 2991, the jury must be able to consider and give effect to
any mitigating evidence relevant to a defendant’s background and
character or the circumstances of the crime.”

1 Penry at 327-328. Therefore, our mitigation statute, A.R.S. § 13-751(G) provides:

2
3 The trier of fact shall consider as mitigating circumstances any
4 factors proffered by the defendant or the state that are relevant in
5 determining whether to impose a sentence less than death, including
6 any aspect of the defendant's character, propensities or record any
and all of the circumstances of the offense, including but not limited
to the following ...

7 In *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), the
8 Supreme Court created the following standards for granting excusal for cause in capital
9 cases:

10 ... a juror may not be challenged for cause based upon his views
11 about capital punishment unless those views would prevent or
12 substantially impair the performance of his duties as a juror in
13 accordance with his instructions and his oath. The State may insist,
14 however, that the jurors will consider and decide the facts impartially
and conscientiously apply the law as charged by the court. See also,
Wainwright v. Witt, 469 U.S. 412 (1985).

15 In *State v. Glassel*, 211 Ariz. 33, 116 P.3d 1193 (2005) the Arizona Supreme
16 Court did not question the trial court's decision allowing the defense to question
17 veniremen regarding their willingness to consider mitigation evidence. The court found
18 that Glassel had not identified one juror who deliberated, who was shown to be
19 unwilling to consider mitigation evidence. An individual who opposes the death
20 penalty, no less than one who favors it, can make the discretionary judgment entrusted
21 to him by the State. *Witherspoon, supra* at 519. The Court held that a "sentence of
22 death cannot be carried out if the jury that imposed or recommended it as chosen by
23 excluding veniremen for cause simply because they voiced general objections to the
24 death penalty." *Id.* at 522.

25 The Supreme Court holdings in *Witt* and *Morgan* teach that potential capital
26 jurors must be clearly undecided on the question of the appropriate penalty in the case
27 before that juror. The real question for potential jurors regarding their views about

1 capital punishment is whether those views would prevent or impair the juror's ability to
2 return a verdict of life or death in the case before the juror. If a fact or circumstance
3 specific to the case would cause the potential juror to invariably vote for death
4 regardless of the strength of the mitigating evidence the defense might present, then the
5 juror's partiality is impaired and he/she should be excused for cause. For these reasons,
6 the parties in a capital case must be permitted to probe into juror attitudes about the
7 significant facts in the specific case.
8

9 **III. WIDE LATITUDE MUST BE AFFORD TO THE *VOIR DIRE* OF**
10 **ATTORNEYS IN THEIR QUESITONING OF THE *VENIREMEN* TO**
11 **ENABLE COURT AND COUNSEL TO EXCUSE THOSE PROSPECTIVE**
12 **JURORS WHO DEMONSTRATE THEIR INABILITY TO SIT FAIRLY**
13 **ON A CAPITAL CASE**

14 Consistent with all of the principles already discussed, the Court and counsel
15 must have wide latitude in *voir dire* to ascertain whether the prospective jurors
16 circumstantially express an inability to consider fairly, as a reason to decline to impose
17 a death sentence, evidence of the defendant's background, history, character or any of
18 the specific factors enumerated in A.R.S. § 13-751(G). This is affirmed by the recent
19 Arizona Supreme Court decision in *State ex rel Thomas v. Granville*, 211 Ariz. 468, 123
20 P3d 662 (2005), and the United States Supreme Court decision in *Tennard v. Dretke*,
21 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004). The rules relating to *voir dire*
22 are set forth in Arizona Rules of Criminal Procedure, 18.5(d) and (e):

- 23 d. The court shall conduct a thorough oral examination of the
24 prospective jurors. Upon the request of any party, the court
25 shall permit that party a reasonable time to conduct a further
26 examination of the prospective jurors. The court may impose
27 reasonable limitations with respect to questions allowed
28 during a party's examination of the prospective jurors, giving
due regard to the purpose of such examination. In addition,
the court may terminate or limit *voir dire* on grounds of
abuse. Nothing in this Rule shall preclude the use of written

1 questionnaires to be completed by the prospective jurors, in
2 addition to oral examination.

- 3 e. The examination of prospective jurors shall be limited to
4 inquiries directed to bases for challenge for cause or to
5 information to enable the parties to exercise intelligently their
peremptory challenges.

6 Capital jurors must not be misled so as to diminish their sense of responsibility
7 for any death sentence imposed. *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Each
8 juror must understand that he or she, alone, is responsible for his or her sentencing
9 decision. Uncorrected beliefs that "responsibility for any ultimate determination of
10 death will rest with others" create a possible bias toward a death sentence. *Id.*, at 333.

11 Typically, prospective jurors who cannot fairly consider all of the factors
12 essential to their determination of whether to impose the death penalty are identifiable
13 by their expression of strong personal feelings such as the opinion that mitigating
14 factors such as abusive treatment during childhood have no place in their decision
15 making. Biased *jurors* may also be identified by statements that a defendant's personal
16 history and background do not have anything to do with the sentence to be imposed.
17 Finally, members of the *venire* who indicate that they would give the death sentence
18 once guilt was proved, and who indicate that mitigating evidence has little or no effect
19 on the sentencing decision, are also unfairly and unconstitutionally biased against the
20 defendant.

21 In determining the propriety of seating a particular *venireman* who has expressed
22 an inability to consider mitigating evidence in the sentencing decision, the Court must
23 be wary of confronting a juror too directly about his inability. If a *venireman*
24 understands from the Court's questioning that he is expected to say that he can consider
25 mitigating evidence even though he does not personally feel it has a place in his
26 decision, the juror will obediently mouth the answer indicated by the question. The
27 *venireman* will not have become any more fair or constitutionally suitable, but he will

1 have satisfied the “wink-and-a-nod” fiction and fulfilled his natural human desire to “fit
2 in” to the moral and ethical framework created by the Judge, whom the average
3 *veniremen* respects as an authority figure with the highest of moral qualities.

4 As previously detailed by the defense, research from the Capital Jury Project
5 (hereinafter referred to as CJP) studied results from actual capital jurors resulted in
6 profound documented deviations between what capital jurisprudence requires and what
7 actual capital jurors believe. Bowers and Foglia, *Still Singularly Agonizing: Law’s*
8 *Failure to Purge Arbitrariness from Capital Sentencing*, 30 Crime Law Bulletin 51
9 (2003). Many jurors who had been screened as capital jurors under *Morgan* standards,
10 and who decided an actual capital case, approached this task believing the death penalty
11 was the only appropriate penalty for many kinds of murder. In effect, mandatory death
12 penalty laws, while banned by the Supreme Court under *Woodson*, are applied by jurors
13 despite the procedural safeguards of *Morgan* and discretionary statutory schemes on
14 which jurors were instructed.

15 In addition to identifying large numbers of jurors who enter the jury box with
16 their own personal mandatory death penalty mindset to guide them – as opposed to the
17 Court’s instructions on the discretionary statutory schemes – researchers identified to a
18 statistical certainty that there was a direct relationship between taking a strong
19 premature stance for death and being identified as “death is the only appropriate
20 sentence juror.”

21 A juror who believes that death is the only appropriate penalty for murdering a
22 child or for murdering more than one person, or for committing those kinds of murders
23 after the defendant had committed an earlier murder is invariably going to decide that
24 death is the only appropriate sentence once they determine guilt. Thus, there was no
25 individualized determination of sentence as the Constitution requires. As many of them
26 expressed, the penalty phase was nothing but a complete waste of time.

1 A juror who believes that death is the only acceptable punishment for certain
2 categories of murder can hardly give meaningful consideration to evidence in
3 mitigation. Such a juror "will fail in good faith to consider the evidence of aggravating
4 and mitigating circumstances as the instructions require him to do. Indeed, because
5 such a juror has already formed an opinion on the merits, the presence or absence of
6 either aggravating or mitigating circumstances is entirely irrelevant to such a juror."
7 *Morgan* at 729. It is for this reason that the *Morgan* Court went on to say that "[I]f even
8 one such juror is empaneled and the death sentence is imposed, the State is disentitled to
9 execute the sentence." *Id.*

10 The data demonstrates that these jurors, much more strongly than non-death-
11 qualified jurors, believe that if a defendant does not testify in his or her own defense,
12 then the failure to do so is affirmative proof of guilt. Death-qualified jurors do not
13 believe in the presumption of innocence. They believe much more strongly that "where
14 there is smoke, there is fire." They are extremely distrustful of defense lawyers and
15 view everything they have to say with a great deal of skepticism. On the other hand,
16 they are extremely receptive to the prosecution and its witnesses – especially police
17 officers – and believe them. Death-qualified jurors do not believe in Due Process
18 guarantees, such as requiring the prosecution to bear the burden of proof beyond a
19 reasonable doubt. They are highly suspicious of experts called by the defense. In short,
20 because death qualified jurors are the least representative of the community as a whole
21 and are the jurors least likely to give a criminal defendant the benefit of the doubt, wide
22 latitude must be afforded in the *voir dire* process.

23 Thus, where prospective jurors circumstantially indicate their inability to
24 consider mitigating evidence or their automatic tendency to impose the death sentence
25 upon a showing of the defendant's guilt, they must be excused or cause. Under such
26 circumstances the failure to excuse the *venireman* for cause will deny the accused due
27

1 process and a fair trial by an impartial jury. The defendant will also be forced
2 prematurely to exhaust his peremptory challenges by excluding such *venireman*
3 peremptorily, a constitutional error. *Gray v. Mississippi, op. cit.* Death qualifying
4 jurors includes mitigation qualifying jurors.

5 Also, what is of importance in the selection of a fair and unbiased jury is that the
6 Judge not hint to jurors what answers he/she wants to hear, but rather creates an
7 atmosphere in which the prospective jurors feel as comfortable as possible about
8 articulating their own moral and ethical principles.

9
10 **IV. CLOSURE OF THE COURTROOM DURING VOIR DIRE WITH**
11 **TRANSCRIPTS TO FOLLOW TO THE PRESS AND PUBLIC IS**
12 **NARROWLY TAILORED AND REQUIRED TO PROTECT MR.**
13 **DEMOCKER'S RIGHTS TO A FAIR TRIAL, A FAIR AND**
14 **IMPARTIAL JURY, INDIVIDUAL CONSIDERATION OF THE**
15 **DEATH PENALTY AND DUE PROCESS UNDER THE LAW**

16 In addition to the defendant's right to a public trial, the press and public generally
17 have a First Amendment right to attend criminal trials, including jury selection.
18 *Richmond Newspapers, Inc. v Virginia*, 448 U.S. 555, 65 L. Ed. 973, 100 S. Ct. 2814
19 (1980), *see also Globe Newspaper Co. v Superior Court for County of Norfolk*, 457 U.S.
20 596, 73 L. Ed. 248, 102 S. Ct. 2613 (1982); *Press-Enterprise Co. v Superior Court of*
21 *California*, 464 U.S. 501, 78 L. Ed. 629, 104 S. Ct. 819 (1984). However, this right is
22 not absolute. The *Press Enterprise* Court observed that the presumption of openness
23 may be overcome by an overriding interest based on findings that closure is essential to
24 preserve higher values and is narrowly tailored to serve that interest. *Id.* Thus, it is
25 within the trial court's discretion to close the proceedings provided the necessary
26 safeguards are taken.

27 In this death penalty case, closure of jury selection is essential to preserve Mr.
28 DeMocker's rights to a fair trial, a fair and impartial jury, individual consideration of
the death penalty and due process under the law. Closure of the process to the press and

1 the public, or exclusion of cameras and filming at a minimum, are required to meet
2 those overriding interests. This case has captured the attention of the local community,
3 even with routine press coverage. In fact, photos of sheriff's officers searching
4 waterways were in the local newspaper while jurors were filling out questionnaires at
5 the courthouse. National news media have also expressed an interest and have been
6 present in court taking video and still photography. One juror has already expressed to
7 the Court her felt need to "protect" herself by violating explicit instructions from the
8 Court after filling out the jury questionnaire. Against this backdrop, jurors will be made
9 to answer challenging personal questions about the death penalty. It is critical to Mr.
10 DeMocker's rights enumerated above that these answers be frank and honest and not
11 made under the threat of public "outing" and humiliation that the presence of the press
12 and public brings to bear.

13 Furthermore, the physical facilities of the courtroom do not permit frequent side
14 bars to conduct private voir dire with individual jurors where necessary. Questions
15 relating to the death penalty and pretrial publicity are likely to cause discomfort for
16 several jurors. Mr. DeMocker has a right to be present at side bars and frequent
17 sidebars would require moving him, all counsel, the court reporter and deputies near the
18 bench in an already cramped and overcrowded courtroom. The courtroom is not
19 equipped with a white noise or other sound machine, making bench conferences audible
20 to those in the courtroom gallery. There is no reasonable way that a juror would feel his
21 or her answers were made privately at a bench conference. The logistical
22 impossibilities of this would require the court to clear the courtroom or move to
23 chambers every time a sensitive issue arises, which can be expected with frequency
24 given the topics at issue in this case. This will also be incredibly time consuming and
25 wasteful for the court and individual jurors who are made to wait while this process
26 proceeds. For these reasons, closure of the courtroom during voir dire is narrowly
27 tailored and required to protect Mr. DeMocker's rights to a fair trial, a fair and impartial
28 jury, individual consideration of the death penalty and due process under the law.

1 Where the court holds a hearing and makes proper findings, sequestered voir dire
2 is constitutionally appropriate and routinely upheld. "Voir dire examination of jurors
3 apart from the others is designed to prevent panel contamination by inflammatory
4 answers." *State v. Bible*, 175 Ariz. 549, 570, 858 P.2d 1152, 1172 (1993) *citing*
5 *Ariz.R.Crim.P. 18.5(d)* comment. The *Bible* court noted that in camera voir dire is most
6 useful in cases involving massive publicity or "unusually sensitive subjects" and is
7 designed to encourage full disclosure "when the prospective juror might be embarrassed
8 to confess his true opinion before an audience." *Id.* *citing*, *Ariz.R.Crim.P. 18.5(d)*
9 comment. The Court noted that "[e]ither procedure can be very useful in appropriate
10 cases. Whether to conduct such voir dire, however, is left to the trial court's discretion."
11 *Id.*

12 Other courts are in accord. *See e.g. Lexington Herald-Leader Co. v Meigs*, 660
13 S.W.2d 658 (1983). In *Meigs*, the trial court initially began sequestered jury selection
14 without holding a hearing or making findings. The appellate court ordered the trial
15 court to hold a hearing on the issue. After the trial court held a hearing permitting
16 members of the press to be heard, it determined that individual interrogation of
17 prospective jurors in chambers absent the public and press was appropriate. This
18 determination was based on the nature of the case and extensive pretrial publicity. The
19 defendant in *Meigs* was one of two persons accused of being hired by a third defendant
20 to kill her husband. The crime generated a great deal of news media coverage which
21 continued and intensified as the case progressed toward trial, and included news reports
22 characterizing the events as a "brutal," "contract" murder. Much of the material, if
23 believed, the court stated, would prejudice the reader, adding that some of the reports
24 were factually inaccurate.

25 The Kentucky Supreme Court stated that the individual voir dire of prospective
26 jurors on their views of the death penalty and their previous knowledge of the case, held
27

1 out of the hearing of their fellow jurors, the public, and the press, is a traditional
2 procedure, used in the trial court's discretion. The court also noted that the uninhibited
3 manner in which the prospective jurors responded to questions about their knowledge of
4 the case did much to vindicate the trial court's decision to question the jurors
5 individually and to exclude the public and the press during the questioning procedure.
6 There is every indication, the court went on, that the procedure used resulted in the kind
7 of full disclosure desirable to select an impartial jury. The court noted that the reason
8 for considering excluding the public and press from voir dire is the right of the accused
9 to "an impartial jury" as guaranteed by the federal and state constitutions adding that the
10 First Amendment gives the press and public a right of access to trial separate and apart
11 from the accused's Sixth Amendment right, and that it is only when necessary for
12 protection of a defendant's Sixth Amendment fair trial rights that a court may, after a
13 proper hearing, bar members of the press and public. The right of press and public
14 access is not absolute, the court stated, but the accused has no exclusive right to either
15 demand or deny the presence of the press and public. The court thus affirmed the denial
16 of the writ of prohibition, stating that the record did not support the media
17 representatives' position that their First Amendment right of access was denied in a
18 manner constitutionally impermissible.

19 Likewise, in *Mississippi Publishers Corp. v Coleman*, 515 So. 2d 1163 (1987),
20 Mississippi Supreme Court approved the closure of pre-trial proceedings, including jury
21 selection, concluding that an unrestricted trial process would result in a substantial
22 likelihood that the defendant would be denied a fair trial due to extensive publicity. The
23 court noted that the case had already become one of the most famous in Mississippi's
24 history, that it had been covered extensively by all segments of the media, and that
25 public interest had been correspondingly high. The court observed that the right to a
26

1 fair trial and the right to a free press, secured by the Federal Constitution and the state
2 constitution had not always been harmonious.

3 In *United States v. King*, 140 F.3d 76 (2d Cir. 1998), which arose out of the
4 retrial of the boxing and entertainment promoter Don King, the district court issued an
5 order providing that; 1) it would conduct individual follow-up questioning of
6 prospective venire persons based on their responses to a juror questionnaire out of the
7 presence of the press and the public; and 2) the individual venire members would be
8 allowed to request that their responses to particular questions be kept confidential, after
9 which the court would decide whether “to redact the response, redact the juror’s name,
10 or seal the transcript of the response.” Transcripts of the individualized voir dire
11 questioning, with such redactions as were deemed necessary, would be released once
12 the jury was impaneled. Media representatives appealed. The Second Circuit affirmed
13 the trial court’s restrictions, finding that “In light of the widespread and largely negative
14 publicity concerning King and the racial tensions heightened by some aspects of that
15 publicity, [the trial judge] was entitled to conduct individual juror questioning in the
16 absence of the press.

17 Similarly, in *In re South Carolina Press Ass’n*, 946 F.2d 1037 (4th Cir. 1991), a
18 case arising out of the “Operation Lost Trust” prosecutions of various South Carolina
19 state legislators on public corruption charges in the early 1990’s, the Fourth Circuit
20 upheld the district court’s order closing voir dire. The case involved “many highly
21 charged and emotional issues,” including charges of vote buying and bribery;
22 allegations of illicit drug use; the appropriateness of government “sting” operations; and
23 assertions by some defendants that they were targeted based on race. *Id.* at 1041.
24 Similarly, in *United States v. Koubriti*, 252 F. Supp.2d 424 (E.D. Mich. 2003), a highly
25 publicized case in which four Middle Eastern men were charged with terrorism-related
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1 offenses, the trial court closed the individual voir dire questioning, but provided for
2 release of transcripts after the jury was empaneled.

3 As with the aforementioned cases, the publicity, sensitivity of the issues, and set
4 up of the courtroom all require the closure of the jury voir dire process to the public and
5 the press in order to protect Mr. DeMocker's right to a public trial, the press and public
6 generally have a First Amendment right to attend criminal trials, including jury
7 selection. At a minimum the Court should exclude cameras or videotaping of voir dire.
8

9 CONCLUSION

10 Defendant is entitled to an impartial and unbiased jury that can assess the
11 propriety of the death penalty within the parameters of the statutes of Arizona and the
12 judicial rules established by the Supreme Courts of the United States and of Arizona.
13 Based upon the research, to accomplish this goal, the defense urges the Court to adopt
14 the requests made in this Motion. Failure to do so will violate the Defendant's rights to
15 due process, equal protection, counsel, a fair trial and appeal, freedom from double
16 jeopardy, and freedom from cruel and unusual punishment under the Fourth, Fifth,
17 Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under
18 the Arizona Constitution, Article 2, Sections 1, 2, 3, 4, 8, 10, 11, 13, 15, 24, 32 and 33,
19 and the authorities cited herein.

20 RESPECTFULLY SUBMITTED this 26th day of April, 2010.

21
22
23 By: 

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27
28

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Attorneys for Defendant

ORIGINAL of the foregoing hand delivered for
filing this 26th day of April, 2010, with:

Jeanne Hicks
Clerk of the Court
Yavapai County Superior Court
120 S. Cortez
Prescott, AZ 86303

COPIES of the foregoing hand delivered this
this 26th day of April, 2010, to:

The Hon. Thomas B. Lindberg
Judge of the Superior Court
Division Six
120 S. Cortez
Prescott, AZ 86303

Joseph C. Butner, Esq.
Prescott Courthouse basket



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